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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARTER ZELEZNIK, ADMINISTRATOR OF THE ESTATE OF ARNOLD F. ZELEZNIK,

PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS, ANGELINA SUPAN, SHIRLEY GALLUP, IRVING JACOBS, MARTA VILLACORTE AND ROBERT SHARON,

RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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Ambler, Pennsylvania, 19002

QUESTIONS PRESENTED FOR REVIEW

There are two separate but related questions, either of which, if answered in the affirmative would give the petitioner the right to litigate with the Commonwealth of Massachusetts in its own courts:

1. Is an all embracing and absolute doctrine of sovereign immunity which fails to take into account the merits of any particular case in which state employees have acted negligently and wantonly, and for which no justification is provided or is even acknowledged to exist, in violation of constitutional requirements for due process and equal protection?

2. Is a combination of judicial decisions and a legislative enactment which creates multiple classes of litigants with regard to their right to sue the Commonwealth of Massachusetts, again with no justification offered or possible, in violation of constitutional requirements for due process and equal protection?

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PETITION FOR WRIT OF CERTIORARI

The administrator of the estate of Arnold Frank Zeleznik petitions for a writ of certiorari to review the judgment of the Appeals Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

The decision of the Appeals Court or the Commonwealth of Massachusetts, which appears in the appendix hereto, p. 2a was entered on October 22, 1980. In the order by the Appeals Court, reference is made to a previous order of June 28, 1979, which is reported in Mass. App. Ct. Adv. Sh. (1979) 1336, and which appears in the appendix hereto, pp. 4-5a. On January 2, 1981, the Supreme Judicial Court of the Commonwealth issued an order, which appears in the appendix, p. 1a denying further appellate review to the petitioner in the courts of Massachusetts.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The order of the Supreme Judicial Court of the Commonwealth of Massachusetts has denied the petitioner the right to suit against the Commonwealth on behalf of the estate of his deceased child, Arnold Frank Zeleznik, who was murdered on December 20, 1974, by a recently discharged patient from the Northampton State Hospital in Massachusetts.

This petition is being docketed in this Court within 60 days of an order dated March 30, 1981, signed by Justice Brennan extending the time of filing in addition to the 90 days from the dismissal of the suit in Massachusetts. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive

> any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Summary of Case. On December 20, 1974, nine year old Arnold Frank Zeleznik was brutally murdered by a recently released patient from the Northampton State Hospital in Massachusetts. The murderer had been "treated" in the hospital for less than 48 hours during which time he attempted to kill two hospital attendants. The hospital record is replete with evidence of negligence and gross negligence in the management of the murderer. The Commonwealth claims that it is immune to suit on the basis of an application of an absolute doctrine of sovereign immunity.

Vernal Walford's Initial Contact with the Northampton State Hospital. Vernal Walford was admitted to the Northampton State Hospital under the alias of Robert

Grant on November 25, 1974 at approximately 5:30 p.m. having been referred from the Springfield Hospital where a psychiatrist found him mentally disturbed and too dangerous for treatment in that institution. Walford was observed by the admitting physician, Dr. Maria Villacorte, to be "quite restless", to have "a very inappropriate affect", to utter "sudden screams" and to attribute his behavior to a voice inside him which he could not control. He stated that people were afraid of him and that he was fearful of being hurt by people. He was further observed to be having auditory hallucinations. His insight and judgment were considered to be very poor. The tentative diagnosis was made of paranoid schizophrenia. Dr. Villacorte also noted that Walford expressed his concern that things might get worse. He was, in her opinion, legally incompetent. She recommended continued hospitalization with

a treatment plan of chemotherapy and ordered that he be secluded if he became agitated.

Disturbances in Walford's Behavior Noted Early in His Hospitalization. According to the nurses' notes in the hospital record, Walford was sedated on November 25 and slept until 4 a.m. the following morning when the attending nurse noted in his record "periods of loud outburst of prayer-like chanting". Walford revealed that his actual name was not Grant but Vernal Newland Walford and that he was from Jamaica, that he was mixed up in an illegal drug ring in which marijuana was smuggled into the United States in exchange for guns. He said he made birth certificates to get people into this country and that his fare was paid from Miami to Massachusetts by this ring. The nurse noted that Walford appeared to hallucinate in "bizarre" fashion.

Assaults by Walford on Hospital Personnel and Threats to Kill; Seclusion and Sedation. Between 8 and 8:30 that morning, after further sedation, Walford violently and seriously assaulted and injured two male attendants who sought to prevent him from attacking two nurses at a ward meeting. According to the nurse's notes, he was placed in seclusion with "much difficulty". There, at 10:30 a.m. Walford was seen for the first time by Dr. Angelina Supan. Speaking through the window of the locked cell door, he told the doctor that "an echoing voice told him 'to kill' before he jumped the attendants." According to Supan, Walford's Jamaican accent and agitated state made it difficult for her to understand him, but she observed that his behavior and facial grimaces were bizarre. His eyes rolled constantly, he spoke in a very loud voice, and it appeared to the doctor that he was responding to voices.

As a result of seeing Walford in seclusion, Dr. Supan concluded that he was "obviously psychotic" and greatly increased the dosage of medication being administered to him.

The Release of Walford from the Hospital. By 10:00 a.m. on the following day, however, Dr. Supan discharged Walford from the hospital. She prescribed a two-week supply of medication and allowed him to leave in his own care. No follow-up treatment plan was arranged. At no time prior to Walford's discharge was a staff meeting held with respect to him or to his discharge. Even Dr. Supan acknowledges this to have been bad medical practice. Except for a casual encounter with a social worker, Robert Sharon, and a brief telephone call to Dr. Shirley Gallup (who never even saw the patient or inspected his record or discussed his case with other staff), Dr. Supan consulted no other member of the hospital staff, professional or non-professional, about her plan

to discharge him. The news of the intended discharge angered nursing personnel when they learned of it who then strongly protested it contending instead that he should be committed to the Bridgewater Hospital. This concern was simply ignored.

The referring psychiatrist, Dr. Linson, in Springfield, was never consulted. The hospital never reported the felonious assault to the police (as required by G.L. c 19 §§ 14F). No effort was made to obtain a civil commitment nor is there any formal evidence that Walford submitted a required three-day notice of his desire to be discharged from the hospital.

Dr. Supan knew that Walford was a violent and dangerous individual as did the nurses who had him locked up. Dr. Supan was careful to protect herself by conducting her "psychiatric interview" with Walford safely on the other side of a locked door. No attempt was made to verify any of the information given by Walford about himself or

his background. No attempt was made to obtain a consultation from a knowledgeable person in the area of mental disorders. At no time during the period of Walford's hospitalization, or thereafter, did any physician or social worker even read Walford's medical record which would have disclosed his true identity and status. No attention was given to his presenting complaint of a foreign body in his eye (which was a *bona fide* complaint). Failure to do so is likely to have exacerbated his condition and have contributed to his angry, destructive, behavior. No attention was given to multiple alternative possible medical explanations for his behavioral abnormalities.

Walford made outspoken, documented, and general verbal threats towards females and towards children while hospitalized, which were simply passed over.

Following his discharge and prior to his murder of Arnold Frank Zeleznik, hospital authorities were aware of irregularities in

his case but they failed even then to acknowledge the potential seriousness of his condition or to take any appropriate action. Their main concern was to protect themselves in response to an attempt on the part of Walford to take legal action against the hospital for his mistreatment while there.

Walford's Murder of Arnold Frank Zeleznik. Three weeks following his discharge from the Northampton State Hospital, Walford seized and abducted nine year old Arnold Frank Zeleznik in the corridor of a Miami motel, less than fifty feet from his parents and younger brother, who heard his brief and muffled screams for help but could not locate him as Walford dragged him into his room. Walford thereupon slit young Arnold's throat and proceeded to hold him over the toilet as Arnold bled to death. The ritual completed, he dumped Arnold's lifeless body into the bathtub and hurried from the motel, going directly to the adjacent Miami International Airport where he was apprehended by the police.

Sovereign Immunity: A Cloak for Substandard Care. This case has been in litigation for over six years. The Commonwealth has defended itself by relying on two main arguments: an application of a blanket doctrine of sovereign immunity, and the notion that psychiatrists are unable to make any reasonable predictions relating to future dangerousness of the mentally ill. "The art of psychiatry is but one step from the art of black magic." (P. 20 in undated defense brief presented to Appeals Court in 19?? and elsewhere repeated.) None of the issues related to the alleged negligence of the hospital and its staff have been responded to otherwise.

At the time of this incident, the Northampton State Hospital was not and never had been accredited by the Joint Commission on the Accreditation of Hospitals. Such accreditation had never been sought because the substandard conditions at the hospital were recognized by the state. Any comparable

non-state hospital would have found itself unable to function without such accreditation.

Raising the Federal Question. At the earliest stage of the petitioner's legal action against the Commonwealth of Massachusetts, the issue of the constitutionality of the doctrine of sovereign immunity was challenged when this was raised by the respondents as a possible bar to action. Specifically, in the plaintiff's memorandum presented in the Superior Court on June 21, 1977, it was pointed out that "the defense of sovereign immunity offends the constitutional principles of due process and equal protection of the laws." (p. 5)

It is important to note that on August 16, 1977, less than two months following that statement, the Supreme Judicial Court decided the case of *Whitney v. the City of Worcester,* 1977 Mass. Adv. Sh. 1713. Here the court again repudiated the doctrine and indicated that it intended to abolish it unless the state legislature were to do

so by the end of the current legislative session. The court also established broad rights in that decision for other "similarly situated litigants". It pointed out the importance of avoiding "constitutional infirmities" in any legislation and drew particular attention to the issue of retroactivity to the time of an earlier decision, that of *Morash & Sons, Inc. v. Commonwealth,* 363 Mass. 612 (1973) in which there had been a similar repudiation of the doctrine and in which rights were established to sue the state against its will in nuisance actions. On the basis of the *Whitney* decision, if not of the *Morash* decision, it appeared to be unnecessary to the petitioner for further attention to be given to the now effectively defunct doctrine of sovereign immunity. Therefore, the action which had been taken to the Appeals Court was stayed awaiting legislative action or a general abrogation of the doctrine by the court as it had promised it would do if the legislature

were not to act "definitively". The stay was in accordance with the suggestions of the court that this be done.

As one of the last legislative actions of the state legislature in 1978, in order to forestall judicial abrogation of the doctrine, a state tort claims act, Chapter 512 of the Acts of 1978, was enacted allowing individuals who had been wronged by the state to take legal action against it without requiring special state permission do do so. (Appendix, pp. 17a-29a) This statute met all of the principles suggested by the court, save one, that one concerned with assuring similar treatment of similarly situated litigants. Retroactivity was included in the statute but only to the date of the *Whitney* decision (which, of course, involved an incident which had taken place years before Arnold's death). Cases which had been pending, as the instant case, for a period of three or more years, were suddenly denied the right of suit although this was not then appar-

ent because the act made no mention as to the disposition of cases arising prior to the date of the *Whitney* decision.

It seemed likely, and indeed, one would expect the court to honor its commitment to the principles it had espoused and to abrogate the doctrine judicially in the pending law suits against the Commonwealth. In the *Morash* decision, the court had promised to consider each case presented before it on its merits in the absence of a valid and comprehensive statute abrogating the doctrine. Had the court kept its promise, the constitutional issue would not have arisen in the present case. Had the court honored its own principles as set forth in *Whitney*, there would be no present controversy.

However, in the case of *Vaughan v. Commonwealth, et al*, 1979 Mass. Adv. Sh. 1070, the court ruled that because the legislature had been silent with regard to actions initiated prior to August 16, 1977, this meant that it had been "definite"

about them and that actions entered into prior to that date would be denied the right of suit against the Commonwealth.

Neither in the *Vaughan* case nor in the *Whitney* case had the parties raised or pressed any issues either relating to nuisance or to constitutional violations. Raising such issues was apparently unnecessary following *Morash* and especially following *Whitney*. However, because *Vaughan* did not raise the constitutional issues, there was no jurisdictional basis in that case to seek appellate review at the federal level.

Nevertheless, as the record shows, the constitutional issue has been raised by the present petitioner both prior to *Whitney* and following *Vaughan*. In the plaintiff's Report filed with the Appeals Court in June, 1979, at least eleven references were made to potential constitutional infirmities associated with the denial of rights of the petitioner in this case. In the plaintiff's brief prepared and presented to the Appeals

Court in February, 1980, no fewer than seventeen references were made to such constitutional issues. At no time has any court in the Commonwealth addressed any of these constitutional issues.

To the contrary, rather than consider the arguments raised by the petitioner, the Appeals Court simply determined that "no constitutional question is presented" in the Report submitted to it from the Superior Court. (Appendix, p. 4a) That Report was made prior to enactment of Chapter 512 and even prior to the *Whitney* decision. As a result, the Commonwealth has been able to obtain a judgment on the merits based upon the defense of sovereign immunity. The only recourse to the petitioner is for the Supreme Court of the United States to make a determination concerning the issues which have been raised.

SUMMARY OF ARGUMENT

When no reasonable and justifiable basis exists for the arbitrary and irrational denial

of basic rights as in the present case, a substantial Fourteenth Amendment Question is raised. By effectively denying any remedy to persons injured by the tortious conduct of the state, its agencies, and its employees, the defense of sovereign immunity deprives the petitioner of substantive due process. By effectively denying any remedy to victims of the state's tortious conduct simply because of the identity of the defendant with the sovereign, while all other victims of tortious conduct are afforded a legal remedy against tortfeasors, sovereign immunity also offends the principle of equal protection of the laws. By providing rights to some litigants and denying them to others, simply because of the chance dates of litigation, some before and some after the incident in question, the principle of equal protection of the laws is offended. In the absence of any justifiable reasons supporting an absolute doctrine of sovereign immunity or an arbitrary denial of rights, the petitioner

should be given the opportunity of proceeding with his legal action against the Commonwealth of Massachusetts in its own courts.

REASONS FOR GRANTING THE PETITION

The question as to the Fourteenth Amendment implications of an absolute doctrine of sovereign immunity have never been adequately resolved although they have been discussed and disputed over a long period of time. (An outstanding review was by Borchard, "Governmental Liability in Tort", *Yale Law Journal*, 1925. His article led to the enactment of the Federal Tort Claims Act. A very recent discussion is by Lieberman in a book, *The Litigious Society*, 1981 (Chapter Six: "The Erosion of Immunity; Who Cannot be Sued".)

In the present case, not only is an absolute doctrine of sovereign immunity challenged on the basis of violation of the Due Process Clause of the Fourteenth Amendment, but there is a challenge to the constitutionality of a combined judicial and statutory denial of right to suit against a government-

al entity even when such right has been extended to other similarly situated litigants and when one finds that the supreme court of a state has repudiated the doctrine on multiple occasions, has more than once called for a legislative enactment which would meet defined criteria of equity, has warned of possible constitutional infirmities in any legislation which fails to adhere to defined criteria, but subsequently is unwilling to consider the very arguments which it, itself, has articulated. Such a complex of issues has never before been treated by this Court. Sovereign immunity applied indiscriminately is sovereign immunity applied irrationally. It defeats accountability and the purpose of government itself. Similarly, when a court raises a constitutional issue and then fails to respond to its own questions, this must be taken seriously, especially when human lives are involved. If fundamental rights can be denied through judicial contortions involving promises, precedents, and the de-

nial of same, no right can be secure in any particular instance.

The issues in this case fall far beyond the retroactive or non-retroactive application of an absolute doctrine of sovereign immunity. They may be related to any of a potentially very large number of situations in which judicial bodies and legislatures must interact. A governmental entity, however, which can arbitrarily deimmunize itself can as arbitrarily reimmunize itself. Courts must constantly review legislative enactments and common law precedents. Issues of equity are important. A clear understanding of principles to be followed, or, as it were, practices to be avoided, in order to insure compliance with constitutional requirements for similarly situated litigants to be treated equally in general is essential. If rights are to be granted (U.S. Constitution), denied (doctrine of sovereign immmunity), granted *Morash* and *Whitney*), denied again *(Vaughan)*, granted again (Chapter 512), and finally de-

nied, there will have been a general erosion of the basis for trust in governmental integrity. The dangers of what has happened in this case become greater as government, state or federal, has assumed ever wider roles in contemporary society.

The deficiencies in this case go far beyond what can be presented in a few pages. If presented in an open trial, they would cause concern in the Commonwealth and elsewhere. A feature article, "Emptying the Mad House", in the May 1981 issue of *Life* magazine discusses the Northampton State Hospital and makes reference to the Walford incident but only scratches the surface of what has been involved there.

Insofar as the public is concerned about its own well being, that of its loved ones, and also for that of the mentally ill, it is important for the facts to be aired. It is also important for there to be information about how tax money is misutilized. Invocation of sovereign immunity prevents public

disclosure of substandard conditions.

Fundamental Rights Are Subject to Denial Because of Sovereign Immunity. The United States Constitution has established certain fundamental rights which are intended to apply to all citizens. These rights, however, are acknowledged not to be absolute because there is always the possibility that the rights of one individual may offend or come into conflict with or be expressed at the expense of some other individual. Consequently, as there may be a need to restrain an individual's rights, or all individuals' rights, it is incumbent upon those who would do so to demonstrate not only the conflict but that fundamental rights are not sacrificed in order to serve lesser rights. It is recognized that rights are not created and dispensed by courts or by legislatures: Courts and legislatures merely recognize them and act so as to support them or to achieve reasonable compromises among them when conflicts arise.

The doctrine of sovereign immunity may be thought of as reflecting the rights of the population as a whole, and thus, by definition, it involves denying individual citizens or groups of citizens certain rights. However, just as the rights of no individual can be absolute, neither can the rights of the population be absolute in opposition to those of any individual. Limits must be set. This is not an easy task and therefore, not one to be taken lightly. If the sovereign acts irresponsibly and thereby causes injury to an individual, this is different from injury which results from unavoidable policy decisions which the sovereign must make from time to time in order to protect the people as a whole. Therefore, where there is good and compelling reason for sovereign immunity to be maintained, no reasonable person can quarrel with the doctrine. Such situations can be defined and defended. Presently, all states, save one (South Dakota), have

placed limitations upon their right to call upon this doctrine. This is evidence that an unrestricted, absolute application of the doctrine is contrary to our social and our legal philosophy.

Recognition of the Wrongfulness of the Doctrine of Sovereign Immunity as an Absolute Doctrine. Legal scholars for many years have expressed a repugnance to an absolute doctrine of sovereign immunity which they have seen as unjustified except for tradition.

> Surely, it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the crown, and that in a republic there is an utter denial of Justice in such cases to any citizen through the instrumentality of any judicial process. (3 Story's Com. on Const. Sect. 1672, in Devereux's "Reports and Digests of Opinions", U.S. Court of Claims, 1856, appendix, pp. 43-44, cited in Sherry, "The Myth that the King Can Do No Wrong", p. 39)

The quotation above, of course, was

written before the enactment of the Fourteenth Amendment. Since the enactment of the amendment, the United States Supreme Court has had many occasions to call upon it to invalidate discriminatory legislation and unfair treatment of citizens. Legal scholars have also consistently expressed disapproval of the doctrine.

In 1938, Freedman spoke of "...the obvious contradiction that the agency formed to protect society is under no obligation, when active itself, to protect an individual member of society." *Liability in Tort of Municipal Corporations in Missouri,* 3 Mo. L. Rev. (1938) According to Sherry, "... The survival of the immunity doctrine is but a judicial state of mind conditioned by the spectre that its relinquishment will bankrupt the sovereign and result in governmental paralysis." *The Myth That the King Can Do No Wrong,* Admin. Law Review 22 (1969) He adds:

> What the private citizen needs is some means of bullying the sovereign into taking appropriate action where a governmental functionary has been indifferent or restraining overzealous conduct, where the functionary has trampled on his individual rights. The resultant frustration or hurt... affects...only incidentally his pocketbook."

In *Brown v. Wichita State University*, 217 Kansas 279 (1975), governmental immunity was held violative of state and Federal constitutional guarantees of due process and equal protection of the laws. It is significant that, even where state legislatures have abrogated sovereign immunity and enacted tort claims acts with short notice requirements, courts have declared such requirements violative of state and Federal constitutional guarantees of due process and equal protection of the laws. See, e.g., *Reich v. State Highway Department*, 386 Mich. 617 (1972) invalidating 60 day notice requirement. If due process is offended by sovereign *liability* conditioned upon notification of the public

entity within a short time after the injury, *a fortiori* due process is offended by sovereign *immunity* irrespective of notice.

According to the South Carolina Supreme Court, immunity fosters neglect and irresponsibility, while liability encourages the exercise of due care. *Brown v. Anderson County Hospital Association,* 234 S.E. 2d 873 (S.C. 1977). That court has stated, "This basic cornerstone of our common law system of jurisprudence is frustrated by total immunity."

In the present case, for example, the absolute doctrine of sovereign immunity protects physician incompetence and negligence under a cloak which has been justified only in relation to state administrative or policy making functions. It serves to encourage the reckless release of dangerous and violent mental patients thus reducing the willingness of the public to recognize the legitimate interests of the mentally ill as a whole, including the

subset who have demonstrated violent behavior. If suit by a member of the public for injuries or death caused by the state's negligent conduct in the reckless release of dangerous mental patients is prevented (which would not be accepted for one minute from a private hospital), the state is encouraged to continue this behavior and to provide substandard care. This has indeed happened. The state's own best interest and that of the public is best served by holding the state and its employees to standards of reasonable conduct, not by immunizing itself from liability.

One reason why the United States Supreme Court may not have acted to declare the absolute doctrine of sovereign immunity unconstitutional may be that individual states preempted it in this regard and acted first. The Supreme Court of the United States, understandably, has also had to consider situations in which the application of sovereign immunity is justifiable and

serves an important public interest.

In *Roe v. Wade*, 410 U.S. 113, 155 (1973), Justice Blackmun, discussing the protection afforded a woman's right to control her pregnancy stated:

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting those rights may be justified only by a "compelling state interest"...and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake...

Due process of law recognizes substantive rights of privacy, procreation, contraception, child-bearing, and free speech which can be limited only by a showing of compelling state interest. Life, a right more fundamental than any of these, deserves just as formidable a protective barrier.

Conclusions Concerning Unrestricted Sovereign Immunity. Given that the Constitution does provide certain fundamental rights and given that the goal of government is to insure those rights, it follows

that by separating the rights of the government from those of the people and placing them in a status above those of the people regardless of circumstances, government becomes oppressive to human freedom and defeats both the spirit and the letter of the Constitution. Both courts and legislatures are acknowledged to have certain rights required to achieve their respective purposes, but these do not include the right to be arbitrary, irrational, or unjust in denying individual citizens of their rights.

From this, it follows that there is no constitutional basis for an absolute doctrine of sovereign immunity and that if sovereign immunity is to be enjoyed by the government in any particular phase of its activities, there must be some specific justification for this. In the absence of a compelling public interest which requires sovereign immunity in a particular area,

it is unconstitutional and in violation of the Fourteenth Amendment. If the government's power to destroy is to be restrained and if government itself is to be accountable to the people, reason dictates that in any situation where it is alleged that fundamental rights of individuals have been deprived by virtue of the gross and wanton negligence of government employees, except where there is a compelling public interest otherwise, the immunity must be denied.

Failure or unwillingness of the government to demonstrate such a compelling public interest, becomes an indicator of inability to do so. In the present case, the United States Supreme Court may call upon the Commonwealth of Massachusetts to state its compelling interest in maintaining an absolute doctrine of sovereign immunity insofar as it has not done so on its own.

On the basis of the considerations above, it follows that the absolute doctrine of sovereign immunity was unconstit-

utional prior to the decision in *Morash* in 1973. While the plaintiffs in that case did not raise the constitutional issue, it would have been appropriate for them to do so. Had they done so, the court would have been hard put not to acknowledge such unconstitutionality given the language which it used in that case. The court characterized the doctrine in that case as possibly having been sound in its inception but long since having lost its validity. It was described as "logically indefensible". The court said the doctrine involved "an inversion of the law" and said that the multiple exceptions which had developed to the rule had \"no necessary relationship to accepted tort principles, equitable principles, or principles of sound public policy." The court avoided complete abrogation of the doctrine at that time but called upon the state legislature to remedy the situation. It did not matter to the plaintiffs at the bar because they were granted

the right to suit in that decision. Others were told that their cases would be considered on an attenuated case-by-case basis. Thus, the court established a precedent allowing suit against the Commonwealth in a limited area, that of nuisance, but it opened the possibilities of broader actions. Its reason for limiting its decision to nuisance is very clear. It wished the legislature to enact a statute addressing the general issue of sovereign immunity on a more comprehensive basis. Surely the court was not more interested in "simple" nuisance suits which might involve minor damage to property and not in major situations involving negligent loss of life. Had the suit before it at the time involved loss of life, it is unlikely that it would have mentioned nuisance. Eight years after that decision, to pretend that the dictum of the court can only be construed to involve damage to property is to misread how case law evolves.

Following the *Morash* decision, therefore, it is unreasonable to assert that there was any justifiable reliance which the Commonwealth could claim with regard to the pre-*Morash* rule. The dictum contained in that decision gave clear warning to the Commonwealth that further reliance on the doctrine was at the peril of the Commonwealth. That this was in fact the case is shown in the *Whitney* decision. Any of a great number of different cases, not just those involving nuisance actions concerning property damages would have triggered the court's response. *Whitney*, of course, was not a nuisance case, nor could one assert that had *Whitney* been litigated prior to *Morash* that the precedent thereby established would have been limited to six year old children who happened to have been blinded as a result of a state employee's negligence.

Further evidence that the court itself

understood that the precedent it had established in *Morash* was not in principle limited to nuisance actions is shown very clearly in *Whitney* where it stated, "While there was widespread and justifiable reliance on the immunity doctrine prior to our decision in *Morash* we think that subsequent to that opinion further reliance was misplaced." In no way did it limit its statement of the meaning of the dictum in *Morash* to nuisance actions nor, of course, was the *Whitney* case one of simple nuisance.

Even if one were to restrict the decision to "nuisance", it may be pointed out that this does not remove the *Morash* decision from providing a precedent for the present case. In this regard it is useful to examine the etymology and significance of the word "nuisance". According to Webster's Dictionary (Seventh New Collegiate Edition), nuisance means "injury" or "annoyance"; it also refers to "an annoying, unpleasant or obnoxious thing

or practice". It is derived from the Latin "nocere" which gives rise to the word "noxious". An earlier Greek root is "nekros" which means "dead body". From a strict point of view, then, "nuisance" is more concerned with death and injury to people than to property damages and the present case amply meets the requirements.

In any event, the release of Walford was like releasing or permitting the escape of a harmful or noxious force or substance which is typically deemed a nuisance. "(A) nuisance may also result from conduct which is merely negligent, where there is no intent to interfere in any way with the plaintiff, but merely a failure to take precautions against a risk apparent to a reasonable man." Prosser, *Law of Torts*, p. 575 (4th ed. 1975)

Further, this case amply meets the requirements in nuisance actions that there be "some substantial interference with the interest involved." Prosser, *supra* at 577.

Indeed, the respondents' nuisance did not merely cause illness or injury typically held to constitute "substantial interference," but further caused conscious pain, suffering and the death of a young boy. The wrongful loss of life is the ultimate "substantial interference".

For purposes of governmental liability, it serves no useful purpose anyway to indulge in fine distinctions between public and private nuisances. Indeed, to hold that governments are liable for private nuisances but not for public ones can produce outrageous results by exalting property interests over human life. If personal injury caused by a falling limb from a city tree is compensable by the municipality as a nuisance (*Kurtigan v. Worcester*, 348 Mass. 284, 1965), then surely conscious suffering and death caused by the reckless discharge of a violent and dangerous mental patient is compensible in nuisance.

For these reasons, the Commonwealth

is liable to the petitioner in nuisance on the basis of the *Morash* decision, and the defense of sovereign immunity is inapplicable. Failure to permit litigation is further a violation of the petitioner's constitutional rights insofar as clear precedent has been established in Massachusetts for suit against governmental units with regard to nuisance actions.

Constitutional Impairment of the Doctrine of Sovereign Immunity Increased by Whitney. Whatever the justification for the doctrine of sovereign immunity being applied as a bar to action in the present case, the decision in the case of *Whitney* weakened it further. Again it may be noted that *Whitney* did not raise the constitutional issue. How it could have survived the judicial test on this occasion escapes one's imagination as the court stated, "On previous occasions we have voiced our conclusion that the government immunity doctrine and the convoluted scheme of rules

and exceptions which have developed over the years are unjust and indefensible as a matter of logic and sound public policy." The court stated further that the "time for change is long over due" and noted that there were then only five states retaining common law immunity at both state and local levels. The court went on to talk of the "task of restructuring our law of government tort liability to bring it into conformity with reason and sound public policy." It saw "no rational order in the existing scheme." "We think that sufficient evolution has occurred in the law of government liability, in the imposition of liability in previous cases (*sic*), in the warnings (*sic*) we have given regarding our intent to abolish the doctrine of governmental liability, and in the voluntary assumption of liability under enabling statutes, that we need not confine the rules forecast in this case to solely prospective operation." (Two years later

in *Vaughan*, the court denied what it had said here.)

Having established that there was no rational or justifiable basis for the doctrine of sovereign immunity in *Whitney*, the court expressed its desire to avoid "unnecessary possibilities of unequal treatment among litigants, as caused by the chance of dates or injuries or lawsuits as related to the sequence of judicial and legislative actions". It expressly acknowledged the possibility of a constitutional issue in stating that "barring any constitutional infirmities, the Legislature would have the final word". "Further, as a matter of sound administration and fairness, we add that where claims against governmental entities or officers have been concluded by judgments prior to the date of any change in the law, petitions to vacate such judgments should be disposed of in accordance with just application of relevant statutes, rules of court and *the principles expressed in this opin-*

ion." (Emphasis added.) If the state judicial system is to be a vehicle for extolling the virtues of sound administration and justice, it must be prepared to apply rules to its own actions, and, this failing, it is incumbent upon the United States Supreme Court to hold it to the task.

Unconstitutionality Claimed with Regard to Chapter 512 of the Acts of 1978. Chapter 512 of the Acts of 1978 limits its abrogation of sovereign immunity to causes of action arising on or after August 16, 1977, and thus only compounds the constitutional infirmities in this case. Enacted while this case was already pending in court for over three years, this new statute leaves the doctrine of sovereign immunity intact with respect to causes of action like the instant case which arose between May 13, 1973 and August 16, 1977. Denial of access to the courts and a legal remedy for wrongful death and conscious pain and suffering on the sole basis of the for-

tuitious circumstances of the date of injury, particularly in a case which has been pending since March 1975, is shockingly unfair, unreasonable, unconstitutional, and in direct conflict with the court's expressed concern with regard to the assurance of equal treatment to all similarly situated litigants and the possibility of constitutional infirmity if this were not done.

Unjustifiable Discrimination Charged. This Court and other courts have recognized that a classification is justified if it can be shown to be founded on some rational or otherwise constitutionally permissible state policy. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 681. It is also noted that the burden is on the individual who assails the classification to demonstrate that the classification does not rest upon any reasonable basis and is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79, *Snell v. Wyman,* 281 F. Supp. 853, *McGowan v. State of Mary-*

land, 81 S. Ct. 1101. It is even noted that when the state has failed to demonstrate a rational basis, classifications have been upheld if the court can construct one. *McDonald v. Board of Election,* 394 U.S. 802.

However, there is a point beyond which a state cannot go without violating the Equal Protection Clause. *Allied Stores of Ohio Inc. v. Bowers,* 358 U.S. 522. A discrimination may be so unjustifiable as to be violative of due process. *Brown v. Board of Education,* 75 S. Ct. 753. A state cannot, by judicial decision or otherwise, remove any of its activities from inhibitions of the Fourteenth Amendment, (*City of St. Petersburg v. Alsup,* 238 F. 2d 830). Failure to provide for equal treatment through Chapter 512 of the Acts of 1978 constitutes an attempt on the part of the legislature to deny to the petitioner a fundamental right afforded to other similarly situated litigants and is therefore unconstitutional.

The reasons for failing to provide re-

lief for litigants who have sought protection during the period following *Morash* and prior to *Whitney* may be assumed to be the same reasons which scholars have alleged to have been employed to justify government immunity itself. These include: 1) protection against nuisance suits, 2) depletion of the tax fund, 3) disruption of financial planning, and, of course 4) "public policy" grounds. See O'Dell, *Government Immunity from Tort Liability: Has the Rationale Disappeared?* Univ. of Miss. at K.C. Law Rev. 39 (1971). The court examined each of these arguments and rejected them in *Whitney*.

A multiple classification system is thus created with regard to tort victims:

> 1. Those whose injuries were caused by the conduct of a governmental tortfeasor prior to the Act, but which had been adjudicated by chance.
>
> 2. Those whose injuries were caused by the conduct of a governmental tortfeasor prior to the Act, but which were not adjudicated by chance.
>
> 3. Those whose injuries occurred after the magic date of August 16, 1977.

4. Those whose injuries were caused by identical conduct on the part of others, irrespective of date.

Such a classification system is not supported, or supportable, on any rational basis. It is granted that it is very difficult, if not impossible, to show that there is no possible rational basis for any classification. An approach to such a task would involve specifying all possible, acceptable, rational bases for classifications in general and showing that none of them applied. In the absence of such an exhaustive approach, it is clear that if a legislative enactment leads to an invidious discrimination as is here the case, inability to specify some acceptable purpose signifies that it is irrational.

No compelling interest of the Commonwealth of Massachusetts has been presented or even hinted at. Those which might have been applied have been rejected by the court itself. It denied that allowing suit would threaten the financial stablity of the Commonwealth or would impose an unacceptable burden upon the

courts of the Commonwealth. No public purpose is served by denying the petitioner the opportunity to demonstrate evidence in court to support his allegations of gross and wanton negligence and incompetence on the parts of Commonwealth employees. No alternative legal action is available to him. Here we have a knowing and an intentional denial of a basic human and constitutional right through the continued application of an archaic, unjust, irrational doctrine, acknowledged as such by the court and by the legislature, but continued through the artifice of contradictory statements and distortions of analogies drawn with another situation. Inequalities not only have been created, but have been compounded and no meaningful public good has thereby been served.

The Issue of Retroactivity Remains Unanswered in its Application to this Case. An important aspect of the present case involves the fact that at some point when a

decision is made to change a rule, a determination must be made as to when that change will be effective. It is possible that a court will determine that a new rule should apply prospectively only, or apply also to past transactions. Whatever the decision, it must be made consistently with the Equal Protection Clause of the Fourteenth Amendment and this requires that if past transactions are not to be protected, there should be some rational basis for the exclusion. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358. In this regard a crucial statement is given by the Court of Claims of the United States in *Davies, Turner & Co. v. U.S.*, 47 C.C.P.A. 129. Similarly, in the Court of Claims it has been acknowledged that that court is bound by its prior decisions under the doctrine of *stare decisis. U.S. v. Delaware Tribe of Indians*, 427 F. 2d 1218 Ct. Cl.

More useful are the principles for the

retroactive application of judicial decisions in which new rules are announced by the United States Supreme Court (*Desist v. U.S.*, 393 U.S. 821-858). The Court in that statement asserted with regard to criminal procedure rules that the issue of retroactivity should be determined in each case by looking to the peculiar traits of the specific rule in question. Of major concern was reliance on the previous rule and the need to protect the reliance interest of the party relying on the previous rule. It said that the most equitable way of overturning an earlier decision would be to hold that the parties are have their rights governed by an earlier decision, but to warn, by means of dictum, that anyone who subsequently relies on the earlier decision -- after the date of the court's opinion or after some other date specified by the court -- will be doing so at his own peril. The use of dictum in such situations assures both flexibility and equitable results.

It is reasonable for less attention to be given to retroactivity where no fundamental rights are involved. In the present case, the most fundamental of all rights are involved.

Nevertheless, while the court thus had the opportunity of presenting a dictum prior to a holding and thus of not establishing a judicial precedent, it chose not to do so, on two separate occasions four years apart. Therefore, as the court stated in *Whitney*, there was no longer a reasonable reliance interest for the Commonwealth with regard to the absolute doctrine of sovereign immunity. Although it is true that the court did not completely abrogate the doctrine, its assertions concerning the irrationality and inequity of the doctrine, its actual holdings, its statements concerning possible constitutional infirmities, and its welcoming to other similarly situated litigants to continue litigation established a recognition of a general right to suit.

The court advised that "similar cases involving other litigants, including cases asserting liability against the Commonwealth or any political subdivision of the Commonwealth, shall be entitled to similar treatment, on the motion of any part." If there were a compelling reliance interest of the state or other rational basis for denying equal protection to such similarly situated litigants, there is an obligation on the part of the court or the legislature to speak to this plainly. Their failure to do so can only be interpreted as a clear sign of their inability to do so.

In fact, where there is a need to do so, as when the doctrine of charitable immunity was abolished in Massachusetts, the court was able to express a valid reason for non-retroactivity. Thus, in *Colby v. Carney-Hospital,* 356 Mass. 527, the court declared its intention to abolish the doctrine of charitable immunity prospectively on the next occasion when it might be squarely con-

fronted with a legal question involving the doctrine unless the state legislature were to take action to abolish it before that time. In this case, the court's action was limited to a mere dictum and there was no holding for the plaintiff. Consequently, in a subsequent decision, following a legislative enactment which did abolish charitable immunity in Massachusetts, it was able to assert that it had previously declared that the doctrine should be abolished prospectively and that at no time had the court abolished the doctrine. *Higgins v. Emerson Hospital,* 367 Mass. 714. Insofar as relief had not been offered to the plaintiff in *Colby,* no question of unequal treatment would arise in *Higgins.* Furthermore, the court was able to articulate an acceptable reason for this on the basis of giving institutions adequate opportunity to obtain liability insurance (i.e., a reliance interest was served.)

By alleging in *Vaughan*

that there were no rights established in *Morash* and *Whitney*, the court flies in the face of the very essence of equal rights and violates its own arguments without justification or reason. Depending upon a faulty analogy with its behavior associated with the abolition of the doctrine of charitable immunity, the court effectively took away rights it itself had granted and others which are inherent in the United States Constitution. While the court has a right to change its mind, it does not have the right to distort its own statements nor to make frivolous changes without justifiable reasons being given. Equal rights may be denied to individuals where there is some rational or justifiable reason for doing so. In the present situation, the court itself has established the absence of such reason and called for the equal treatment for all parties which are similarly situated.

It is understandable that the court did not make a blanket abrogation of the doc-

trine of sovereign immunity itself in order to protect the legitimate interests of the state. That, however, should not be used as an excuse to deny rights where the state is using sovereign immunity only as a cloak for covering the negligence of its employees in non-uniquely governmental activities.

Failure to justify lack of retroactivity can hardly be explained as an oversight on the part of the legislature nor could it be unnoticed by the court. Insofar as the legislature responded to all of the other principles the court suggested with regard to the abrogation of the doctrine, does not its failure even to respond to the issue of retroactivity, the one issue which raises the question of unequal treatment, condemn the legislative outcome as unconstitutional?

Implications of the Martinez Decision. A recent decision of the Supreme Court of the United States, *Martinez, et al v. State of California et al,* 48 U.S.L.W. 4076 (January 15, 1980) is instructive. In that case, the

appellants' decedent, a 15 year old girl, was murdered by a parolee five months after his release. Appellants claimed state officials to be responsible for damages caused by the parolee. In affirming dismissal of the complaint, the Supreme Court addressed the constitutionality of Section 845.8 of the California Government Code, which specifically confers immunity on the state and its officials for injuries "resulting from determining whether to parole or release a prisoner..." *Id.*, at 4077. The Court found California's underlying policy determination to be rationally furthered by the statute noting that judicial review of parole decisions would inevitably inhibit the exercise of discretion and thereby "impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards."

The critical distinction in the present

case is that the parole function is a uniquely governmental function and was covered by a specific statute whereas care of the mentally ill is not a uniquely governmental function but is being covered by a blanket doctrine of immunity, one characterized by the highest court in the Commonwealth as "unjust and indefensible as a matter of logic and sound public policy". *Whitney*.

The Court in *Martinez* noted that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from State action that is wholly arbitrary or irrational." 48 U.S.L.W. at 4077. In the present case, state action is indeed wholly arbitrary and irrational.

Moreover, the circumstances of this case preclude any determination as a matter of law that Arnold's death was "too remote a consequence" of Walford's release. Unlike *Martinez*, five months did not intervene be-

the release and the murder in this case: It was only *three weeks* between discharge and murder. In *Leverett v. State of Ohio,* 399 N.E. 2d 106, the court held that the state may be liable if its physician negligently releases a mental patient who is dangerous and subsequently (*three months*) commits murder, that such a gap does not as a matter of law, negate proximate cause and that this is a matter for determination by the trier of fact. While recognizing the uncertainties associated with the care of individuals with psychiatric disorders, the Ohio court pointed out that the decisions of skilled doctors were highly discretionary and subject to rebuke only for the most flagrant, capricious, and arbitrary abuse. It noted that the public has a need, and a right, to rely on professional decisions being made in mental hospitals as having been made reasonably and in good faith, that where there might be a negligent release, where the hospital knew or should have known that the patient, upon

his release, would very likely cause harm to himself, or others, and where this could be anticipated and not merely asserted on the basis of hindsight, a cause of legal action would be deemed to exist.

Conclusions Concerning Sovereign Immunity. For the many reasons given above, it follows that Chapter 512 of the Acts of 1978 cannot be constitutionally applied so as to deny a remedy against the Commonwealth for cases arising between May 13, 1973 and August 16, 1977 and that the absolute doctrine of sovereign immunity as employed with respect to such cases by the Commonwealth of Massachusetts is similarly unconstitutional.

There is more than a casual relation between the behavior of the government and of those governed. If individual citizens are to be accountable for their actions, they must see such accountability in those they look up to, their parents, and those who govern them. There should be a clear justification for non-accountability for any in-

dividual or social entity. There are reasons for the excessive violent crime in our country which include alienation and frustration (which may be accentuated in the mentally ill). There is also the perception of there being no consequences for individual or group actions, a perception strengthened by a perception of all powerful governmental entities and employees not being held responsible for their actions even when those actions do not differ in kind from the actions of others who are not associated with a governmental entity. If fear stalks our streets and our homes, we should look beyond simple failure to punish criminals for an explanation and to the model image which government has offered to us in its management of its responsibilities in general. The image so offered by the Commonwealth through a continued application of an absolute doctrine -- not of sovereign immunity but of *sovereign irresponsibility* -- is repugnant to reason and to the goals of

social order. Such irresponsibility led directly to the death of Arnold Frank Zeleznik. Had Walford been treated in a private hospital, accountable for its negligence, a higher standard of professional conduct would have been applied and the outcome would have been different. Knowing that there was no standard of professional conduct expected of state employees, there was an open invitation to them, if convenience dictated, to be negligent and they were. Mental illness alone does not produce violence. Mental illness without proper care may do so.

The need for governmental accountability was recognized in the Declaration of Independence. It is even more explicit in the Constitution and especially in the Fourteenth Amendment which sets limits on what states may do with regard to individuals, limits which arise from a profound conception of the nature of mankind. When that conception is respected, we need fear neither men as individuals nor government. In the present

situation, that conception is belittled through the actions and statements of the courts and legislature of the Commonwealth of Massachusetts in applying a blanket doctrine of sovereign immunity to cover up the state's negligence.

CONCLUSION. Under the circumstances, it was reasonably foreseeable, if not inevitable, that left on his own, Walford would kill or injure someone, most likely a woman or a child. No compelling state interest has been shown which justifies the blanket governmental immunity which has been used by the Commonwealth in order to escape its liability for the wrongful death of Arnold Frank Zeleznik. Denial of a legal remedy simply because it is the Commonwealth which is the wrongdoer is irrational and unconscionable. No purpose is served by preventing a clear demonstration in a court of the Commonwealth as to the unwholesome quality of the operation of its mental hospital.

We are confronted with a situation in which

the state has caused the loss of life through its negligence. What public policy can justify this? What good is thereby served? The state asserts that it is still an absolute sovereign and is entitled to do as it will. Whence such unaccountability? What is its justification? Under what authority does it persist? If there were once a reason for it, scholars and courts have long since been unable to state it and have said as much.

If there is a rational basis for an absolute doctrine of sovereign immunity being applied in this case, let it be heard in this Court and thereby dissipate the doubts and the distrust which the decisions and actions of the courts in Massachusetts have produced.

While society should be prepared to accept reasonable risks commensurate with the goal of returning the mentally ill to society and meeting their general physical and emotional needs, society should not be forced to accept unreasonable risks associated with negligent and reckless care given to them,

nor should the mentally ill be forced to accept substandard care which pointlessly exposes them to the tragic consequences of their own defective controls.

This lawsuit against the Commonwealth is Arnold's last testament and legacy to the world in which he lived and which he loved. Arnold has made his peace. It is we who are his survivors who have yet to make ours. The wrong which was done to him cannot be undone, but the conditions which led to it are still in need of correction.

Although it has been held that statutory entitlement to sue for the wrongful death of another is not itself a fundamental or consitutional right (*Parham v. Hughes*, 99 S. Ct. 1742) it should be understood that monetary compensation could not produce adequate redress in the present situation in any event: What is sought is the right to litigate, to put the Commonwealth of Massachusetts on unequivocal notice that its right to act irrationally and arbitrarily and in violation of

United States Constitution is subject to challenge and that its negligence is subject to disclosure in a court of law.

Even, therefore, if the United States Supreme Court in its wisdom were to permit suit only for the purpose of demonstrating publicly the truth of the allegations made by the petitioner without any opportunity for a monetary award to be obtained, Arnold's last possible constitutional right, that of being heard would be assured.

The motivation for this suit lies in the notion that in a free society, the citizen has not only the right to protest injustice, but the obligation to do so, the power of the government to prevent that protest in the courts notwithstanding. Nay, given the power of the state to prevent such protest from being made in its courts, the obligation is made the more compelling.

Arnold Frank Zeleznik, if squarely confronted with a situation which would have called upon him to sacrifice his life for

the well being of others, would have done so without hesitation as so many others have in fact done, although he would have wanted to say good bye and "I love you". He would have done so because he was a child of compassion and courage. But neither he nor any other person should be called upon to sacrifice any right, least of all their lives, to no good purpose, or to a negative purpose, such as the protection of the incompetence, negligence, and irresponsibility of a state and its functionaries.

For the reasons given, this Court should grant the relief requested and allow the appellant to litigate his claim.

Respectfully submitted,

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